

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

ENCOMPASS INSURANCE COMPANY, as
subrogee of Juan Polanco and Martina Fernandez,

Plaintiff,

Docket No: 07 CV 3857 (SCR)

-against-

DE LIMA CONTRACTORS, INC, GENE DE
OLIVERIA, Individually, and d/b/a/ OLIVEIRA
CONTRACTING, and ALBERT PALANCIA
AGENCY, INC.,

Defendants.

ANSWER

Defendant, ALBERT PALANCIA AGENCY, INC., by its attorneys, LUSTIG & BROWN, LLP, as and for its Answer to the Complaint, alleges upon information and belief as follows:

THE PARTIES

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "1" of the Complaint.
2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "2" of the Complaint.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "3" of the Complaint.
4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "4" of the Complaint.
5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "5" of the Complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "6" of the Complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "7" of the Complaint.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "8" of the Complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "9" of the Complaint.

10. Admits the allegations contained in paragraph numbered "10" of the Complaint.

11. Admits the allegations contained in paragraph numbered "11" of the Complaint.

JURISDICTION AND VENUE

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "12" of the Complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "13" of the Complaint.

FACTUAL ALLEGATIONS

14. With regard to the allegations contained in paragraph numbered "14" of the Complaint, the answering Defendant repeats and reiterates each and every response contained in paragraphs numbered "1" through "13" inclusive, of this Answer, with the same force as if fully set forth at length herein.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "15" of the Complaint.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "16" of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "17" of the Complaint.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "18" of the Complaint

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "19" of the Complaint.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "20" of the Complaint.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "21" of the Complaint.

22. Admits that Defendant Palancia procured certain insurance policy for Defendant DeLima and issued certain certificates to DeLima as evidence of DeLima's insurance, refers this Honorable Court to the policies for their terms and conditions and denies knowledge or information as to the remaining allegations contained in paragraph numbered "22" of the Complaint.

23. Admits that Defendant Palancia procured certain insurance policy for Defendant DeLima Contractors, Inc. ("DeLima") and issued certain certificates to DeLima as evidence of DeLima's insurance, refers this Honorable Court to the policies for their terms and conditions and

denies knowledge or information as to the remaining allegations contained in paragraph numbered "23" of the Complaint.

24. Admits that Defendant Palancia procured certain insurance policy for Defendant DeLima and issued certain certificates to DeLima as evidence of DeLima's insurance, refers this Honorable Court to the policies for their terms and conditions and denies knowledge or information as to the remaining allegations contained in paragraph numbered "24" of the Complaint.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "25" of the Complaint.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "26" of the Complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "27" of the Complaint.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "28" of the Complaint.

29. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "29" of the Complaint.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "30" of the Complaint.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "31" of the Complaint.

32. Denies knowledge or information sufficient to form a belief as to the truth of the

allegations contained in paragraph numbered "32" of the Complaint.

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "33" of the Complaint.

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "34" of the Complaint.

35. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "35" of the Complaint.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "36" of the Complaint.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "37" of the Complaint.

38. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "38" of the Complaint.

**FIRST CAUSE OF ACTION
NEGLIGENCE
AGAINST DEFENDANTS DELIMA AND OLIVEIRA**

39. With regard to the allegations contained in paragraph numbered "39" of the Complaint, the answering Defendant repeats and reiterates each and every response contained in paragraphs numbered "1" through "38" inclusive, of this Answer, with the same force as if fully set forth at length herein.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered "40" of the Complaint.

41. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "41" of the Complaint.

42. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "42" of the Complaint.

43. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "43" of the Complaint.

**SECOND CAUSE OF ACTION
NEGLIGENCE
AGAINST ALL DEFENDANTS**

44. With regard to the allegations contained in paragraph numbered "44" of the Complaint, the answering Defendant repeats and reiterates each and every response contained in paragraphs numbered "1" through "43" inclusive, of this Answer, with the same force as if fully set forth at length herein.

45. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "45" of the Complaint.

46. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "46" of the Complaint.

47. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "47" of the Complaint.

48. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "48" of the Complaint.

49. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "49" of the Complaint.

50. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "50" of the Complaint.

51. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "51" of the Complaint.

**THIRD CAUSE OF ACTION
BREACH OF CONTRACT
AGAINST DEFENDANTS DE LIMA AND OLIVEIRA**

52. With regard to the allegations contained in paragraph numbered "52" of the Complaint, the answering Defendant repeats and reiterates each and every response contained in

paragraphs numbered "1" through "51" inclusive, of this Answer, with the same force as if fully set forth at length herein.

53. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "53" of the Complaint.

54. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "54" of the Complaint.

55. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "55" of the Complaint.

56. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "56" of the Complaint.

**FOURTH CAUSE OF ACTION
MISREPRESENTATION AND FRAUDULENT INDUCEMENT
AGAINST ALL DEFENDANTS**

57. With regard to the allegations contained in paragraph numbered "57" of the Complaint, the answering Defendant repeats and reiterates each and every response contained in paragraphs numbered "1" through "56" inclusive, of this Answer, with the same force as if fully set forth at length herein.

58. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted

against the remaining defendants contained in paragraph numbered "58" of the Complaint.

59. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "59" of the Complaint.

60. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "60" of the Complaint.

61. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "61" of the Complaint.

62. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "62" of the Complaint.

63. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "63" of the Complaint.

64. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "64" of the Complaint.

65. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "65" of the Complaint.

66. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "66" of the Complaint.

67. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "67" of the Complaint.

68. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "68" of the Complaint.

69. Denies the allegations as asserted against Defendant Palancia and denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted against the remaining defendants contained in paragraph numbered "69" of the Complaint.

FIRST AFFIRMATIVE DEFENSE

The allegations set forth in the Complaint fail to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

If plaintiff or plaintiff's subrogee have sustained any injuries or damages as a result of the matters as alleged in the Complaint, then such injuries and damages resulted from plaintiff's or plaintiff's subrogee's own culpable conduct, and if recoveries are to be had in this action, such recovery must be reduced in proportion to which plaintiff's or plaintiff's subrogee's own culpable conduct caused or contributed to their damages.

THIRD AFFIRMATIVE DEFENSE

The plaintiff's action is barred due to the application of the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed because there is no privity of contract.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's complaint should be dismissed because plaintiff has failed to plead fraud with the requisite particularity required by Rule 9(b) of the Federal Rules of Civil Procedure.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's action must be dismissed because the doctrine of assumption of the risk acts as a bar to any recovery.

JURY DEMAND

Defendant, ALBERT PALANCIA AGENCY, INC. demands a jury on all issues herein stated.

WHEREFORE, Defendant demands judgment as follows:

- (a) The causes of action of Plaintiff as against Defendant Palancia be dismissed;
- (b) Judgment be awarded to Defendant Palancia based upon the Affirmative Defenses;
- ©) Any recovery awarded to Plaintiffs be diminished in proportion to which Plaintiff's own culpable conduct contributed to their claimed damages; and

(d) Such other relief be awarded as the Court deems just and proper.

Dated: New York, New York
July 18, 2007

LUSTIG & BROWN, LLP
Stephen C. Cunningham

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(Via Electronic Service)

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